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No. 88-651

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

RICHARD ANDERSON PHOTOGRAPHY,
Petitioner,

v.

RADFORD UNIVERSITY, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF *AMICI CURIAE* OF THE ASSOCIATION OF AMERICAN PUBLISHERS, INC. AND THE ASSOCIATION OF AMERICAN UNIVERSITY PRESSES, INC. IN SUPPORT OF PETITION FOR CERTIORARI

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MOTION OF THE ASSOCIATION OF AMERICAN PUBLISHERS, INC. AND THE ASSOCIATION OF AMERICAN UNIVERSITY PRESSES, INC. FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

The Association of American Publishers, Inc. ("AAP") and the Association of American University Presses, Inc. ("AAUP") respectfully move for leave to file the attached brief *amici curiae*. The consent of counsel for Petitioner has been obtained, but counsel for Respondents has refused consent.

The AAP is a trade association of book publishers. Its approximately 300 members publish between 70 and 75% of the dollar volume of all books published in the United States. Its members' publications include text, technical and reference books, works of fiction and general nonfiction, together with a variety of works in other media including computer software and databases.

The Association of American University Presses, Inc. is a not-for-profit association of university presses. Its 80 members include the presses of virtually every distinguished university in the United States, as well as several Canadian and international scholarly publishers.

As publishers and copyright proprietors, *amici* have a direct and compelling interest in this case. All depend on competitors' and customers' respect for the property rights guaranteed by §106 of the Copyright Act. Most importantly, all market their copyrighted works to state and state entities. Some AAP and AAUP members derive a substantial portion of their income from state universities such as Respondent Radford University, which has been held in the opinion below to have Eleventh Amendment immunity from liability for damages for copyright infringement. This decision, if not reviewed and reversed, may have greater impact upon *amici* than upon Petitioner, since they rely to such a large extent on state entities for their income.

The Court should grant *certiorari* in order to insure that states and state entities not obtain—demonstrably against congressional intention—a judicial license freely to duplicate, adapt, or publicly perform others' copyrighted works without authorization or any payment of royalties until such time as such infringements may be discovered and an injunction sought and issued.

To present their views as to why this Court should grant *certiorari* in this important copyright case, *amici* move for leave to file the attached brief *amicus curiae.*

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BRIEF OF *AMICI CURIAE*

INTEREST OF *AMICI CURIAE*

The interest of *amici* is set out in the foregoing motion.

SUMMARY OF ARGUMENT

1. Congress has the power to abrogate states' Eleventh Amendment immunity whenever it enacts legislation under its plenary authority, including the authority found in such diverse provisions of Article I of the Constitution as those covering interstate commerce, copyright, and bankruptcy matters. This Court has never held otherwise. A decision to do so would not only deprive Petitioner of a federal forum for seeking relief from state Respondents in the instant controversy, but also deprive copyright owners of *any* forum in which to seek effective relief for copyright infringement from states and state entities (or compel Congress to provide for copyright actions in state courts, a result wholly at odds with the plenary copyright power granted in Article I).

2. Congress, at the conclusion of a comprehensive process of examination and revision of the copyright law, enacted a statute that by its terms and its structure clearly envisaged states' liability for copyright infringement damages. The judgment below contravenes that clear congressional intent, duly enacted into law.

ARGUMENT

I. ARTICLE I OF THE CONSTITUTION EMPOWERS CONGRESS TO ABROGATE THE STATES' IMMUNITY TO SUITS FOR DAMAGES IN FEDERAL COURTS

In most Eleventh Amendment cases, "the issue is not the general immunity of the States from private suit . . . but merely the susceptibility of the States to suit before *federal tribunals.*" *Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 240 n.2 (1985) (emphasis in original) (quoting *Employees v. Missouri Dep't of Public Health and Welfare,* 411 U.S. 279, 293-94 (1973) (Marshall, J., concurring in result)). Whenever the Eleventh Amendment has previously been found to preclude federal court jurisdiction, some other forum has been available. *See, e.g., Atascadero,* 473 U.S. at 240 n.2 ("It denigrates the judges who serve on the State courts to suggest that they will not enforce the supreme law of the land"); *Pennhurst State School and Hosp. v. Halderman,* 465 U.S. 89, 121-23 (1984) (requiring pendent state law claims to be brought in state court); *Welch v. State Dep't of Highways,* 107 S.Ct. 2941, 2953 n.19 (1987) (worker's compensation claim could be pursued in state court).

For petitioner and all others holding copyrights, however, Congress long ago decided that to maintain the unity and integrity of copyright law—a worthy goal that Congress is surely empowered to pursue—no relief can be sought in state courts.[1]

For publishers represented by *amici,* as well as others —authors, artists, playwrights, filmmakers, composers, computer programmers, and more—of this country's creative commu-

[1] 28 U.S.C. § 1338(a) (1982). The Copyright Act, by preempting state laws that might otherwise cover copyright infringing activities, 17 U.S.C. § 301 (1982), precludes any possibility that copyright owners might seek relief from state entities on state law grounds in state courts. *Cf. Welch,* 107 S.Ct. 2941, where a state law remedy was potentially available.

nity, therefore, a holding that Congress could not, under its Article I powers, abrogate Eleventh Amendment immunity, would be devastating. AAP and AAUP members, for example, do substantial business with state entities.[2] Indeed, some specialized publishers may do the majority of their business with entities having potential Eleventh Amendment immunity. If the Eleventh Amendment closes the federal courthouse door to them, then states would be free to ignore the carefully crafted balance created by the copyright law, 17 U.S.C. §§ 101 *et. seq.*[3] The availability of actions for damages against state employees in their individual capacities, *Richard Anderson Photography v. Radford University,* 852 F.2d 114, 122, does little to restore that balance. Large-scale infringements may lead to substantial liability,[4] as to which state employees might well be partially or totally judgment-proof.

Until relatively recently, very few copyright cases had involved Eleventh Amendment issues. The only two cases

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[2] AAP estimates that, in 1986, U.S. book publishers sold $1.1 billion worth of college and university textbooks to customers with potential Eleventh Amendment immunity who might well not be liable for damages should they choose to copy rather than purchase such materials. *See generally,* Register of Copyrights, *Copyright Liability of States and the Eleventh Amendment* 5-17 (1988) (hereafter "1988 Register's Report").

[3] While under Eleventh Amendment doctrine some manner of injunctive relief may be available, Congress could not have considered injunctions alone to be an adequate remedy for copyright infringement. By their nature, injunctions can merely "forestall future violations." *United States v. Oregon State Medical Society,* 343 U.S. 326, 333 (1952). Injunctions, unlike damages, do not provide any degree of recompense to aggrieved copyright owners for infringements that have already occurred, or for markets that have been substantially eroded, if not destroyed. Nor are they available without a likelihood of repeated harm by the infringing party. A limitation to injunctive relief would eliminate any real possibility of favorable settlement for copyright owners and would permit the continuation of infringing activity by great numbers of entities, until in each separate case the particular infringement happens to be detected and an injunction obtained.

[4] Congress, recognizing the necessity of providing substantial damages in order to deter infringements and compensate their victims, has recently doubled the monetary limits in the section of the copyright law providing for statutory damages for infringement, 17 U.S.C. § 504. See, 134 Cong. Rec. H10093 (1988).

concerning the Copyright Act of 1909 were split on the Eleventh Amendment question. In *Wihtol v. Crow,* 309 F.2d 777 (8th Cir. 1962), the court held a school system immune from liability for a teacher's infringing duplication of a musical work, while in *Mills Music, Inc. v. Arizona,* 591 F.2d 1278 (9th Cir. 1979), the court held a state liable for the unauthorized public performance of music. In the last several years, however, additional courts have felt themselves constrained to accord Eleventh Amendment immunity in copyright cases,[5] notwithstanding the evident conflict between that result and the clear congressional intention to subject "anyone" infringing copyrights to federal suit.

The Fourth Circuit declined to reach the question whether Congress has the power to subject states to suit in federal court for copyright infringement, holding that even assuming the power existed it had not been properly invoked according to the demanding standards this Court has imposed subsequent to passage of the Copyright Act of 1976. *Richard Anderson Photography,* 852 F.2d 114, 117 (4th Cir. 1988). It is imperative for this Court to reach and settle that question of congressional power. Protection for *amici's* copyrights and their substantial investment in those copyrights depends on their ability to secure either the protection that Congress undoubtedly *intended* to provide in 1976, or additional legislation to the same effect but this time containing the magic words this Court has subsequently held may be necessary to achieve the same result. If Congress presently lacks the power to subject states to copyright infringement actions in federal court, Congress would have to decide whether to jettison its long-standing policy against concurrent jurisdiction over copyright actions in state courts, or to seek adoption of a constitutional amendment

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[5] *BV Engineering v. UCLA,* _____ F.2d _____, 8 U.S.P.Q. 2d 1421 (9th Cir. 1988); *Cardinal Indus. v. Anderson Parrish,* No. 83-1038-Civ-T-13 (M.D. Fla. Sept. 6, 1985), *aff'd* 811 F.2d 609 (11th Cir.), *cert. denied,* 108 S.Ct. 88 (1987); *Woelffer v. Happy States of America, Inc.,* 626 F.Supp. 499 (N.D. Ill. 1985); and *Mihalek Corp. v. Michigan,* 595 F.Supp. 903 (E.D. Mich. 1984), *aff'd on other grounds,* 814 F.2d 290 (6th Cir.), *cert. denied* 108 S.Ct. 503 (1987). *Contra, Johnson v. University of Va.,* 606 F.Supp. 321 (W.D. Va. 1985).

permitting federal court suits against states for copyright infringement. Whatever approach is necessary, time is of the essence. Demonstrably, this case would be an appropriate vehicle to clear away roadblocks to achieving, through any of these routes, the protection Congress both intended and clearly will provide, if necessary.

On the merits of this case, *amici* submit that Congress clearly has the power, under Article I of the Constitution, to abrogate Eleventh Amendment immunity. This court has suggested that such power exists, and, as set out below, several courts of appeals have expressly reached this conclusion. See, e.g., *Green v. Mansour,* 474 U.S. 64, 68 (1985) ("Because of the Eleventh Amendment, States may not be sued in federal court unless they consent to it in unequivocal terms or unless Congress, *pursuant to a valid exercise of power,* unequivocally expresses its intent to abrogate the immunity") (emphasis added); *Welch,* 107 S.Ct. at 2946 (power assumed); *County of Oneida v. Oneida Indian Nation,* 470 U.S. 226, 252-53 (1985) (same), *United States v. Union Gas Co.,* 832 F.2d 1343, 1356 (3d Cir. 1987), *cert. granted, sub. nom. Pennsylvania v. Union Gas Co.,* 108 S. Ct. 219 (1988)[6] (constitutional amendments not to be read as if on a time line; "a constitutional grant of plenary authority to Congress" sufficient to abrogate Eleventh Amendment immunity); *In re McVey Trucking, Inc.,* 812 F.2d 311, 314-23 (7th Cir.), *cert. denied,* 108 S.Ct. 227 (1987) (discussing *Atascadero* and its predecessors, and concluding, after extensive analysis, that the various Congressional plenary powers cannot be distinguished); *In re Vazquez, Guerrero and Compton,* 788 F.2d 130, 132 (3d Cir.), *cert. denied,* 107 S.Ct. 414 (1986) (abrogation of Eleventh Amendment immunity under Bankruptcy Clause); *Mills Music, Inc. v. Arizona,* 591 F.2d 1278, 1285 (9th Cir. 1979), effectively overruled, *BV Engineering v. UCLA,* ____ F.2d ____, 8 U.S.P.Q. 2d 1421 (9th Cir. 1988) ("[T]he Copyright and Patent Clause is a

[6] AAP and AAUP have filed a brief *amici curiae* in *Union Gas* in support of Respondent Union Gas' argument that Congress may abrogate Eleventh Amendment immunity when legislating under the authority of Article I.

specific grant of constitutional power that contains inherent limitations on state sovereignty . . . [A]brogation of a state's Eleventh Amendment immunity is inherent in the Copyright and Patent Clause and the Copyright Act"); *Peel v. Florida Dep't of Transp.*, 600 F.2d 1070, 1080-81 (5th Cir. 1979) (Congress may abrogate state immunity in an act passed pursuant to the war powers in Art. I, § 8). See also *County of Monroe v. Florida*, 678 F.2d 1124, 1132 n.8, 1133 (2d Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983) (Congress may, pursuant to Art. IV, § 2, cl. 2, abrogate state immunity from suit on extradition-related claims).

Recognition of Congress' power to abrogate Eleventh Amendment immunity under Article I is essential if the statutory balance between copyright owners and users of their works is to be maintained. Recent copyright litigation and other claims of Eleventh Amendment immunity in the copyright context[7] reflect assertions that states are substantially beyond the reach of the copyright law. A decision holding Congress unable to abrogate state immunity under its Article I powers could affect the fundamental property rights of *amici* and all copyright owners.

II. IN THE COPYRIGHT ACT CONGRESS EXPRESSED IN UNMISTAKABLE LANGUAGE ITS CLEAR INTENTION TO SUBJECT STATES TO COPYRIGHT LIABILITY

If, as we have argued, Congress has the power to subject Respondent Radford University to liability for copyright infringement in federal court, then the question remains whether

[7] In a recent congressionally requested inquiry, the Copyright Office of the Library of Congress noted that, in addition to the six states asserting Eleventh Amendment copyright immunity in the cases cited in n.5, *supra* (Virginia, California, Florida, Massachusetts, Michigan and Illinois), North Carolina, Wisconsin, Minnesota, and Texas have asserted their immunity in other contexts. 1988 Register's Report at 8, 9, app. C at CRS-21 (1988).

Congress has exercised that power. Under traditional standards, and even under the more demanding standards that this Court has recently announced,[8] the answer to the question here, as recognized by the dissent in the Fourth Circuit[9], is plainly "yes." Because Congress clearly expressed its intent to require states to respect rights granted in the Copyright Act—rights that can be enforced *only* in federal court—the conclusion is inescapable that Congress successfully abrogated state immunity.

The Copyright Act, 17 U.S.C. §§ 101 *et seq.*, encourages the production of artistic or literary works by granting authors and publishers valuable and enforceable rights, such as the exclusive rights to reproduce and distribute copyrighted works. § 106. As part of the broad scheme of copyright protection embodied in the Act, § 501(a) provides that "*Anyone* who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright" (emphasis added). All infringers of copyright,[10] with only limited exceptions in narrow circumstances, are subject to actions for damages and injunctions (§§ 502, 504).

Unlike statutes considered in cases where the issue has been not whether Congress intended to create a remedy at all but only in what courts the remedy could be obtained, the Copyright Act contains both inclusive language in § 501(a) and

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[8] Where, as here, there is no real alternative remedy or forum, the Court should not be reluctant to find Congressional intent to abrogate, and the stringent requirements of *Atascadero State Hospital v. Scanlon, supra,* and *Welch v. State Dept of Highways, supra,* should not apply. But this Court need not reach that conclusion since, as will be shown, those stringent requirements are met here.

[9] *Richard Anderson Photography,* 852 F.2d at 126-129.

[10] The district court recognized that "the Copyright Act's general authorization for suit against 'anyone' is sufficiently broad to include the States." *Richard Anderson Photography v. Radford University,* 633 F.Supp. at 1159. See also *Johnson v. University of Virginia,* 606 F.Supp. 321, 324 (D. Va. 1985) (reasoning that "the language of the 1976 Act is at least as sweeping, and probably more sweeping, than the language of the 1909 Act in identifying the class of defendants subject to copyright infringement suits" and concluding that "the 1976 Act waived the states' Eleventh Amendment immunity from liability for damages and equitable relief for copyright infringments").

several other provisions that specifically show Congress' intent to bring the states within its reach, and to render them liable as infringers in the same manner as all other defendants, except where specific exemptions were carefully carved out. See generally *Richard Anderson Photography,* 852 F.2d at 126-129 (dissent).[11] There should be no doubt that the phrase "governmental bodies" used repeatedly in the statute, both as used colloquially and, more importantly here, as used throughout the copyright revision program that culminated in the Copyright Act of 1976, includes state entities. *See* House Comm. on the Judiciary, *Copyright Law Revision,* "Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law," 87th Cong., 1st Sess. at 129 (Comm. Print July 1961) (hereinafter "1961 Register's Report"), expressly noting that the law contained "nothing to prevent *governmental bodies,* at least of the States, from securing copyright...." (emphasis added).

Beyond these statutory provisions, Congress' intent to allow states to be sued in federal court for violating the Copyright Act is shown by the express statutory scheme of the Act itself. First, in § 106, Congress granted to copyright owners *exclusive* rights, subject only to carefully crafted exemptions.[12]

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[11] The Court used similar reasoning in holding, in *Patsy v. Board of Regents,* 457 U.S. 496 (1982), that exhaustion of state administrative remedies is not a prerequisite to an action in federal court under 42 U.S.C. § 1983. The Court examined a statute enacted after § 1983 that created a "specific, limited exhaustion requirement for adult prisoners bringing actions pursuant to § 1983," *Id.* at 508, and concluded that the exhaustion provisions of the more recent statute "make sense, and are not superfluous," only if Congress intended that § 1983 contain no general requirement of administrative exhaustion. *Id.* at 512. Similarly, the exemptions in the Copyright Act for state activity "make sense, and are not superfluous," only if Congress intended to abrogate state immunity and subject states to suit for copyright infringement.

[12] *See Goldstein v. California,* 412 U.S. 546, 560 (1973) (discussing, in a case considering a state's anti-piracy statute, the inherently broad reach of federal copyright protection): "When Congress grants an exclusive right or monopoly, its effects are pervasive; *no citizen or State may escape its reach"* (emphasis added).

Second, in § 301, Congress expressly preempted all state copyright laws—and even state laws equivalent to copyright. Third, 28 U.S.C. § 1338(a) grants to the federal courts exclusive jurisdiction of all actions arising under the federal copyright laws.

Finally, the Copyright Act permits the states themselves to obtain copyright protection. Congress was well aware that states and state entities regularly obtained federal copyright protection for their works.[13] It cannot be assumed that Congress intended to permit the states regularly to take advantage of the full benefits of the Copyright Act and at the same time be free of its obligations.

Under this statutory scheme, all copyright claims must be brought in federal court, applying the federal copyright laws. A decision denying a federal forum to claimants who allege copyright violations by states is essentially a conclusion that Congress intended to leave these claimants without a meaningful remedy, and to permit states to disregard the rights of copyright owners with impunity.

In this critical aspect the Copyright Act is altogether different from the statutes the Supreme Court has determined did not abrogate state immunity. In *Welch v. State Dep't of Highways, supra,* 107 S.Ct. at 2953 n. 19, for example, the Court recognized that the plaintiff there "is not without a remedy: she may file a worker's compensation claim against the State under

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[13] *See* 1961 Register's Report, *supra,* at 129 ("Almost every State in the Union has registered copyright claims in some of its informational publications"). *See also* Senate Comm. on the Judiciary, *Copyright Law Revision Study No. 33,* "Copyright in Government Publications," 86th Cong., 2d Sess. at 129 (Comm. Print 1961) "Most of the States have enacted statutes for the securing of copyright in certain of their publications or in their publications generally. And even in the absence of any statute, almost every State has claimed copyright in some of its publications. A survey by the Copyright Office shows that during the 5-year period 1950 through 1954 about 4,700 copyright claims were registered in the name of a State or a State agency or in the name of an official on behalf of a State." See generally 1 M. Nimmer, *Nimmer on Copyright* § 5.06[A] n.1 (1986).

[state law]." Similarly, in *Atascadero State Hospital v. Scanlon, supra,* 473 U.S. at 238 n. 2, the Court explained that immunity from federal suit under the statute involved there would not exempt the states from compliance with the law, because they would still be subject to suit in state court. The Court emphasized, "It denigrates the judges who serve on the stae courts to suggest that they will not enforce the supreme law of the land." *Id.*

There is not a shred of evidence to suggest that Congress intended to leave states free to violate federal law by infringing the rights of copyright owners. To the contrary, the entire statutory scheme unmistakably expresses Congress' intent to abrogate state immunity. To uphold the court of appeals' decision would frustrate that express Congressional intent.

CONCLUSION

For the foregoing reasons, the petition for *certiorari* should be granted.

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